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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-299

MESA OIL COMPANY, an Arizona corporation,
Petitioner,

vs.

BUSINESS MEN'S ASSURANCE COMPANY OF AMERICA, a Missouri corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Abbreviations

The following abbreviations when used herein, have the indicated meanings:

CR = Clerk's Record (Vol. I of Record)

RT/mot. = Reporter's Transcript of Hearings on Summary Judgment Motion (Vol. II of Record)

RT/reh. = Reporter's Transcript of Rehearing (Vol. III of Record)

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OCTOBER TERM, 1973

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Mesa Oil Company, plaintiff-appellant below, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit, entered March 6, 1973, affirming *by a divided panel* the decision of the District Court granting respondent's motion for summary judgment. This Petition is based upon the grounds that the decision of the Ninth Circuit (1) is in conflict with the decision of other circuits and the Supreme Court on the important and recurring question of the applicability of state law in federal courts where jurisdiction is based solely on diversity of citizenship, and (2) decides an important state question in conflict with state law. (Supreme Court Rule 19)

OPINIONS BELOW

The decision of the District Court for the District of Arizona is not reported, but a copy of its judgment is printed as Appendix A to this Petition. The opinion of the Court of Appeals for the Ninth Circuit is reported at 476 F.2d 491 and is annexed as Appendix B to this Petition.

JURISDICTION

The order of the Court of Appeals for the Ninth Circuit was entered on March 6, 1973. Petitioner's Motion for Rehearing was denied by a divided court pursuant to an order of the Court of Appeals entered on May 9, 1973. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254(1).

QUESTIONS PRESENTED

Where Arizona law requires undefined policy terms to be construed strictly against the *insurer*, and where it requires exclusionary clauses to be construed even more strictly than basic coverage provisions, did the District Court and the Court of Appeals err in construing the undefined and exclusionary term "drug" strictly against the *insured*?

Where an insurance policy provided that "No [accidental death] benefits will be paid if death results directly or indirectly from . . . taking any poison or drug, voluntarily or involuntarily", and where an insured decedent died accidentally from "poisoning due to the combined effects of barbituric acid and alcohol", was an issue of fact presented in determining whether barbituric acid

is a "drug" when "drug" is not defined in the policy and definitions of "drug" from other sources differ?

Where the meaning of "drug" in the policy is undefined, and where definitions of that term from other sources are conflicting and uncertain, and where Arizona law requires such conflicting definitions to be resolved by a jury, did the Court of Appeals err in affirming the District Court declaration that "drug" is unambiguous as a matter of law?

STATEMENT OF THE CASE

1. The Facts and Proceedings Below

Plaintiff-petitioner, Mesa Oil Company, is the owner-beneficiary of a life insurance policy issued by respondent, Business Men's Assurance Company of America (hereafter BMA). The policy provides for an additional Fifty Thousand Dollars ($50,000) of coverage in the event of the accidental death of the insured.

Cletus O. Chamberlain, the insured-decedent, had been drinking certain alcoholic beverages in the company of his wife on the evening of August 28, 1967. The Chamberlains arrived home in the early morning hours of August 29, 1967. They both retired, each to separate bedrooms, and apparently Mr. Chamberlain thereafter accidentally ingested a substance, the effect of which, when combined with the beverages he had previously consumed, dulled his central nervous system to the point where his breathing and heart beat became so depressed that death resulted (CR, p. 123). An autopsy was subsequently performed by the office of the Maricopa County Medical Examiner in Phoenix, Arizona and the performing physician certified that:

> "It is my opinion that Cletus O. Chamberlain died as a result of: Poisoning due to the *combined effects of barbituric acid and alcohol.*" (Emphasis added) (CR, p. 81).

Mesa Oil filed the contractually required notices with BMA seeking to recover the death benefit to be paid if the insured died an accidental death. BMA refused to pay the Fifty Thousand Dollar ($50,000) accidental death benefit provided by the insurance policy, basing its refusal on a provision of the policy's exclusionary clause. That clause read, in pertinent part:

> "No [accidental death] benefit will be paid *if death results directly or indirectly from . . . taking any poison or drug, voluntarily or involuntarily . . .*" (Emphasis and bracketed language added) (CR, p. 227).

Neither "poison" nor "drug" was defined in the policy.

Following BMA's refusal to pay the accidental death benefit, Mesa Oil filed this action in the Superior Court of Arizona. Pursuant to 28 U.S.C. §§ 1441, *et seq.*, BMA removed the suit to the United States District Court for the District of Arizona, where jurisdiction was founded upon diversity of citizenship and an amount in controversy exceeding Ten Thousand Dollars ($10,000) (CR, p. 1). BMA filed its Answer and Counterclaim, and the latter was subsequently dismissed voluntarily (CR, p. 138). BMA moved for summary judgment (CR, p. 70), and Mesa Oil made demand for trial by jury (CR, p. 141).

In its Motion for Summary Judgment, BMA specifically assumed the truth of and agreed with the following assertions of fact made by Mesa Oil: (a) Chamberlain's death was caused by a lethal combination of alcohol and barbituric acid in his system; (b) neither the quantity of

alcohol nor the quantity of barbituric acid, acting alone, would have been sufficient to cause Chamberlain's death; (c) rather, the combination of the two substances in Chamberlain's system had a synergistic effect that killed him; (d) the ingesting of the fatal substances was both accidental and unintentional; and (e) Mesa Oil is the owner and beneficiary of the insurance policy which is the subject of this action (CR, pp. 71, 170).

Argument on BMA's motion was heard on November 23, 1970; and District Judge Walter E. Craig awarded BMA summary judgment at the hearing (RT/mot.). Mesa Oil moved for a rehearing (CR, p. 177); and following argument thereon, Judge Craig denied the motion and reaffirmed his award of summary judgment to BMA (RT/reh.). Thereafter, Mesa Oil appealed that judgment to the United States Court of Appeals for the Ninth Circuit. In a decision entered March 6, 1973, the Court of Appeals affirmed by a divided panel the District Court judgment. Mesa Oil moved for a rehearing, but the Court of Appeals, again by a divided panel, denied the motion in an order entered on May 9, 1973. Mesa Oil petitions this Court to reverse the award of summary judgment and remand the case for trial by jury.

2. Reasons for Granting Certiorari

Certiorari should be granted in this case for two reasons. First, the decision of the Ninth Circuit is in direct conflict with its own decisions, with the decisions of other circuits, and with the decisions of the Supreme Court on the important and recurring question of the applicability of state law in federal courts where jurisdiction of the federal court is based solely on diversity of citizenship. It is settled that in a diversity action a federal court must follow the substantive law of the state in which it sits.

The District Court and the Court of Appeals, however, ignored the clear substantive case law of Arizona which they were required to apply.

Second, the District Court decided an important state question in conflict with state law. Arizona requires undefined policy terms to be construed strictly against the insurer, that exclusionary clauses be construed even more strictly than basic coverage provisions, and that the meaning of ambiguous terms be resolved by a jury. However, the District Court, and the Court of Appeals on review, construed an undefined policy term and exclusionary clause not strictly against the insurer, but rather according to their own interpretation of the meaning of the term and clause, and in the process emasculated the function of juries under Arizona law to interpret ambiguous policy terms. Because the decisions below do not require insurance companies to define the term "drug" and do not themselves define the word "drug" it is now a matter of conjecture as to the meaning of that term as used in insurance policies. To give that term meaning the courts, in the future, must consider piecemeal, and substance by substance, the scope of that term, to solve a problem the Arizona courts have already told the insurance companies they must solve themselves by adequately defining policy terms within the policies themselves. More importantly, the decision allows the question of definition to be begged in favor of the insurer absent a trial on the merits and a review of all the evidence. As a matter of policy, in light of the extensive use of and reliance upon insurance in our society, the onus of identifying what is to be excluded from coverage should not be upon the public and the courts, but upon the insurance companies.

ARGUMENT

1. Summary Judgment Was Improper in This Case, and the District Court and the Court of Appeals Erred Not Only in Ignoring the Law on Granting Summary Judgment but Also in Neglecting to Follow Arizona Law Regarding the Construction of Undefined and Ambiguous Exclusionary Terms.

a. Introductory statement identifying the essential issue in this case.

The autopsy revealed that Cletus Chamberlain died accidentally from the combined effects of barbituric acid and alcohol. For purposes of the appeal below, BMA conceded that it was the synergistic effect of these two substances on Chamberlain's system which killed him, and BMA also conceded that neither substance alone was sufficient to cause death. BMA agreed that the ingestion by Chamberlain of whatever substance he took was both accidental and unintentional. Coupled with these admissions of fact is the recent decision by the Arizona Court of Appeals in *United American Life Insurance Co.* v. *Beadel*, 13 Ariz. App. 196, 475 P.2d 288 (1970), in which the court affirmed a lower court's ruling that accidental death resulting from the synergistic effect of alcohol and barbiturates was not excluded from coverage by an insurance clause barring payment of accidental death benefits if death resulted directly or indirectly from taking any poison. The insurance company's petition for review by the Arizona Supreme Court was denied on January 5, 1971 (see 475 P.2d at 288), and the decision of the Court of Appeals is now final.

The effect of the foregoing is to eliminate for purposes of this Petition any question that Chamberlain died directly or indirectly from taking any poison, or from an

overdose of either drugs or alcohol alone, or that his death was suicidal. Since BMA has never contended that "drug" includes within its meaning alcohol, the main issue for this Petition and the chief bone of contention between the parties is simply whether the term "drug" so clearly includes within its meaning barbituric acid that any differences among reasonable men regarding whether Chamberlain died indirectly from taking any drug are precluded as a matter of law.

b. Principles of law regarding the circumstances under which summary judgment is proper.

Rule 56(c), Fed. R. Civ. P., provides in pertinent part:

"The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

The law with respect to the circumstances under which an award of summary judgment is proper is so well known as to need almost no elaboration. Such an award is automatically precluded by the existence of one genuine issue of material fact. Rule 56(c) of the Arizona Rules of Civil Procedure was adopted verbatim from the above quoted Federal Rule 56(c); and the Arizona Supreme Court has recently stated in concise and clear fashion the guiding principles which an appellate court must observe in reviewing an award of summary judgment:

"In considering a motion for summary judgment, we must view the evidence in light most favorable to the losing party and give such party the benefit of all favorable inferences that may be reasonably drawn

therefrom. If the evidence thus viewed is such that reasonable men may reach different conclusions as to whether there is a genuine issue as to any material fact, the judgment must be reversed. (Citing cases) Summary judgment should not be granted if, upon examination of the entire record, it is determined that there is a disputed fact which, if true, could affect the final judgment. (Citing cases) Litigants are entitled to a trial where there is the slightest doubt as to the facts. (Citing cases) Further, although certain basic facts are undisputed, if factual inferences must be drawn therefrom in order to render judgment and reasonable minds could draw different inferences, summary judgment is not proper. (Citing cases)" *Livingston* v. *Citizen's Utility, Inc.*, 107 Ariz. 62, 481 P.2d 855, 857 (1971).

The same law controls in the federal courts: The party opposing summary judgment is entitled to all the favorable inferences which may reasonably be drawn from the pleadings, affidavits, etc.; and if when these documents are so viewed reasonable men might reach different conclusions, the motion should be denied (*Caylor* v. *Virden*, 217 F.2d 739 (8th Cir. 1955)). In a summary judgment proceeding, the court's sole function in reviewing these pleadings, affidavits, etc., is simply to determine if a genuine issue of material fact *exists* and not what the *resolution* of that fact issue should be (*Byrnes* v. *Mutual Life Ins. Co. of New York*, 217 F.2d 497 (9th Cir. 1955), *cert. denied*, 348 U.S. 971, 75 S. Ct. 532, 99 L. Ed. 756 (1955)).

In awarding summary judgment in this case, the District Court and the Court of Appeals on review erred in neglecting to follow the principles of law noted above. As will be shown in more detail, below, a genuine issue of material fact exists in this case regarding the definition and

meaning of the term "drug" in the policy's exclusionary clause.

c. Arizona law regarding the construction of undefined and ambiguous terms in insurance policy exclusionary clauses.

At the outset, reference to the policy reveals that nowhere in its pages does a definition or explanation of the term "drug" appear. In addition, "drug" is used in the policy's *exclusionary* clause rather than in its basic coverage provisions. Arizona law regarding the construction of undefined policy terms and of exclusionary language is well settled and crystal clear: Undefined terms are to be strictly construed in favor of the insured and coverage and against the insurer (*Brenner* v. *Aetna Ins. Co.*, 8 Ariz. App. 272, 445 P.2d 474 (1968); *Malanga* v. *Royal Indemnity Co.*, 101 Ariz. 588, 422 P.2d 704 (1967); *Beadel, supra*). Such undefined terms are to be defined in the common everyday language of the average layman and not in terms of highly technical medical definitions; they are also to be construed in a reasonable manner and given their ordinary meaning and effect (*Dickerson* v. *Hartford Accident & Indemnity Co.*, 56 Ariz. 70, 105 P.2d 517 (1940); *Malanga, supra; Brenner, supra; Beadel, supra;* see also *Prudential Ins. Co.* v. *Barnes*, 285 F.2d 299 (9th Cir. 1960)). In addition to the foregoing, Arizona law requires exclusion clauses to be construed even more strictly than basic coverage provisions (*Brenner, supra*). Phrased another way, Arizona law requires undefined policy terms to be defined in the common everyday language of the average layman rather than in highly technical medical terms. It also requires that in addition to construing such language in a reasonable manner and giving it its ordinary meaning and effect, any doubts as to that meaning are to be resolved in favor of the insured and strictly against the in-

surer. Finally, where such undefined terms appear in an exclusionary clause, an even stricter standard of construction applies. The insurer will be held to a rigid standard of the utmost clarity in narrowly defining its exclusionary terms; and *any* doubt or uncertainty whatsoever, however slight, regarding their meaning will be conclusively resolved in favor of the insured and coverage.

d. Malanga and Beadel: The controlling Arizona cases for the issues presented.

The *Malanga* and *Beadel* cases noted above are the two Arizona cases most similar on their facts and issues to this case; and they represent the leading and controlling authorities in Arizona regarding the construction of undefined insurance policy language. Paradoxically, the courts in each case arrived at identical results (coverage was affirmed) and applied the same principles of construction, even though the cases were diametrically opposed on certain of their facts.

In *Malanga*, the insured decedent died from the combined effect of alcohol and barbiturates. The effect was synergistic, i.e., neither substance consumed was sufficient by itself to cause death. The insurance company refused to pay the accidental death benefit to the decedent's wife, relying upon the following terms of the insurance policy:

> " *'This insurance is against loss * * * resulting directly and independently of all other causes from accidental bodily injuries* sustained during the term of the policy * * *' (Emphasis added)." 422 P.2d at 706 (Emphasis in original)

The term "bodily injury" was not defined in the policy; but the company refused to pay the accidental death benefit, claiming that bodily injury was limited to those

cases where some cut, bruise, or rupture appeared on part of the body. The court declined to accept this limitation and noted:

> "If the Company had intended to limit the words 'bodily injury' to injuries which were traumatic in nature, it might easily have done so by simply inserting such a provision in the policy. At best, the fact that such limiting provision is not present makes it uncertain whether the phrase 'bodily injury' is so limited. When the language of such a policy is unclear this Court has been and continues to be guided by the general rule '* * * that policies of this nature are construed in favor of the injured when any ambiguity appears therein.' (Citing *Dickerson, supra.*) Another principle often applied in these cases and applied to this Court in the *Dickerson* case is that the undefined words of an accident insurance policy will be defined in the commonsense terms of the average layman rather than in the terms of a highly technical medical definition." 422 P.2d at 707.

The court construed the term "bodily injury" broadly in favor of the decedent; and it ruled that his death was so clearly included within its meaning that "in the sense in which the term 'bodily injury' is ordinarily used and understood, we think it is impossible to conclude otherwise." 422 P.2d at 707.

In *Beadel*, the insured decedent also died from the synergistic effect of alcohol and barbiturates. The insurance company again refused to pay accidental death benefits, claiming that the decedent had not died of bodily injury as that term was defined in the policy, but had instead died from taking poison. The company relied on two policy provisions, one of which was a basic coverage provision and the other of which was an exclusionary clause. The

basic coverage provision provided for the payment of the benefit where death resulted from bodily injury. Bodily injury was defined as:

> "'* * * An injury * * * effected * * * through external violent and accidental means, as evidenced by * * * internal injuries revealed by an autopsy. * * *'" 475 P.2d at 290.

The exclusion clause provided that:

> "'Exclusions. No amount shall be payable under this rider if death results directly or indirectly * * * from any poison * * * accidentally or otherwise taken * * *'" 475 P.2d at 290.

With regard to the basic coverage provision, the company contended that bodily injuries must be proven by visible and external signs and that the mere depression of the central nervous system (an internal injury) was insufficient. As in *Malanga*, the court rejected this attempt to limit the basic policy provision and instead affirmed the trial court's broad construction of "bodily injuries" to include internal injuries. As its reasoning, the court adopted verbatim the statement of the law from *Malanga*, quoted *supra*, p. 11.

With regard to the exclusion clause, the court noted that no specific definition for "poison" was found in the policy. Despite the company's attempt to define that term as broadly as possible so as to include the decedent's cause of death, the court ruled that:

> "If the insurance company wished to exclude the kind of incident in question, other wording would have been more appropriate. If insurance companies wish to guard against covering modern, lackadaisical use of drugs and alcohol, they can specifically exclude such

coverage. We believe it is the rule to construe undefined terms against the insurer and in common layman's language. Therefore, we believe this accident is covered by the policy terms and is not excluded as poison. Dickerson v. Hartford Accident & Indemnity Co., 56 Ariz. 70, 105 P.2d 517 (1940); *Malanga*, supra; Brenner v. Aetna Insurance Co., 8 Ariz.App. 272, 445 P.2d 474 (1968).

"We conclude the trial court was correct in finding coverage." 475 P.2d at 292 (Emphasis in original)

BMA claims that it has followed the admonition of the *Beadel* case by including appropriate language in its exclusionary clause which specifically excludes the decedent's cause of death. Nothing, however, could be further from the truth; for all BMA has done is employ in its exclusionary clause an undefined, overly broad generic term lacking any definition whatsoever which would assist the court in determining whether any decedent's cause of death is specifically excluded thereby. As in *Malanga* and *Beadel*, if BMA had intended specifically to exclude from coverage Chamberlain's cause of death, it could have chosen wording more appropriate. The mere insertion in its exclusionary clause of some such statement as the following would have been sufficient to remove any doubt regarding whether Chamberlain's cause of death was covered:

"No benefits will be paid if death results directly or indirectly from . . . taking any poison or drug, voluntarily or involuntarily. *'Drug' includes but is not limited to any barbiturate, barbiturate compound, sedative, hypnotic substance, narcotic substance, other habit forming or addictive substance, sleeping pills or portions, and the like.*"

Some such wording as the foregoing was obviously what was intended by both the *Malanga* and *Beadel* courts when they insisted upon the employment by insurers of appropriate and specific policy language. In the present case, BMA's failure to define "drug" or to provide any hint regarding the scope of its application leaves a doubt in the minds of those procuring such insurance and those enforcing the terms of such policies, as to the causes of death which are intended to be excluded from coverage. The resolution of that doubt in favor of the insured and coverage is required by Arizona law.

Both the *Malanga* and *Beadel* cases represent a definitive statement of the public policy of Arizona with regard to the standard of construction it will apply to undefined and ambiguous insurance policy language. Despite the fact that both basic coverage provisions and exclusionary clauses were involved in these cases, the court applied the Arizona principles of construction noted above strictly and with consistency. The present case fits exactly within the law as declared by *Malanga* and *Beadel*, and the District Court and the Court of Appeals erred in declining to follow that law and reach a similar conclusion.

e. Arizona law regarding the role of the jury in construing ambiguities in a contract.

In addition to the foregoing principles of law regarding the construction of undefined insurance policy language, Arizona courts have long held, in keeping with the universal rule, that while the responsibility for the interpretation of contracts is upon the court, where the meaning of a contract is ambiguous, and where extrinsic facts and circumstances resorted to in an attempt to resolve the ambiguity are themselves conflicting, it is for the jury as fact finder to resolve this latter conflict. The decision of

the fact finder is conclusive; and only when the conflict has been resolved may the court determine the legal effect of the contract (*Sam Levitz Furniture Co.* v. *Safeway Stores, Inc.*, 10 Ariz. App. 225, 457 P.2d 938 (1969); *Ridara Livestock Co.* v. *Agricultural Products Co.*, 61 Ariz. 473, 150 P.2d 761 (1944); *Miller Cattle Co.* v. *Francis*, 35 Ariz. 535, 281 P. 211 (1929)). As will be shown below, the various sources resorted to in an attempt to define the term "drug" do not agree on a common everyday definition of that term; and by awarding summary judgment, the courts below deprived Mesa Oil of its right under Arizona law to have those conflicting definitions resolved by a jury.

2. Application of the Foregoing Principles of Law to the Facts of This Case Reveals That a Genuine Issue of Material Fact Exists Regarding Whether the Insured Decedent Died Indirectly from Taking Any Drug.

a. Beadel applied Arizona law correctly and construed the undefined term "poison" strictly against the insurer and for the insured; Arizona law requires the same result here with "drug".

Since the term "drug" was not defined in the policy, the search for its meaning must be carried elsewhere; and the answer to whether barbituric acid was included within that meaning must be sought from external sources. As noted above, when a meaning is sought for undefined insurance policy terms, Arizona courts require strict adherence to certain well settled and controlling principles of law. To reiterate briefly, Arizona courts required the meaning of such terms to be defined in the common every day language of average laymen and not in highly technical medical terminology nor, as noted by the court in *Beadel* (CR, p. 157), as those terms are normally defined

in such statutes as Arizona Revised Statutes, § 32-1964, as amended. (BMA's reliance in its Motion for Summary Judgment (CR, p. 171) on the definition contained in this latter statutory section is, therefore, inappropriate and incorrect.)

Again, Arizona courts also require the meaning of undefined insurance policy terms to be construed strictly against the insurer and for coverage of the insured. In *Beadel,* the undefined term "poison" appeared in the policy's exclusion clause, and therefore the court resisted the broad definition which the insurer urged for that term and instead construed its meaning more narrowly in favor of the insured and coverage. In the present case, the exact same situation is present: The undefined term "drug" appears in BMA's exclusion clause; and Arizona law requires the court to resist BMA's broad definition of that term and instead to construe it narrowly in favor of Mesa Oil and coverage of the insured. Finally, because "drug" appears in the *exclusion* clause of BMA's policy, Arizona law requires an even *stricter* standard of construction to be applied to the meaning of that term. The slightest doubt or uncertainty whatsoever in its meaning must be resolved in Mesa Oil's favor.

b. Definitions of the term "drug" from standard reference works, including that used in Beadel, present a variety of differing and inconsistent meanings and uses of the term.

In attempting to define undefined policy terms in the common every day language of the average layman, Arizona courts have resorted to such authorities as Black's Law Dictionary (*Beadel*) and Webster's Dictionary (*Dickerson*).

Black's Law Dictionary, Fourth Edition (1951), defines "drug" as being:

> "The general name of substances used in medicine; any substance, vegetable, animal, or mineral, used in the composition or preparation of medicines; any substance used as a medicine. . . ."

Webster's Third International Dictionary defines "drug" not only as a substance used as a medicine or in the making of medicines, but also as "something narcotic in its effect."

The Random House Dictionary of the English Language (Random House, Inc., 1967) defines "drug" not only as a medicinal substance or a narcotic but also as "a chemical substance administered to . . . prevent or cure disease or otherwise enhance physical or mental welfare" and "any personal hygienic items sold in a drug store. . . ."

Each of these works is a recognized authority for the definition in common every day terms of such words as "drug"; and the Arizona courts on at least two occasions (*Dickerson* and *Beadel*) have employed them. As may be seen from these works, some definitions of "drug" seem mutually exclusive of others (e.g. "narcotic" hardly seems like a chemical substance administered to "enhance physical or mental welfare"); but even if the definitions are not truly inconsistent, they do show that the term "drug" can be understood and used in a variety of senses. This variety of meanings is precisely the problem in the present case; for the reason why it is not clear if "drug" includes barbituric acid is because "drug" is not defined in the policy, and it is unclear in what sense that term is used therein. In *Beadel*, the meaning of the word "poison" was equally ambiguous; and the court noted that commonly speaking one conjured up such names as arsenic and cy-

anide when thinking of that term. In the present case, the word "drug" normally suggests to the average layman such substances as heroin, morphine, cocaine, etc.

None of the definitions above, referred to in seeking the "plain, ordinary and popular" meaning of the term "drug", define "drug" in such a way that either "barbiturate" or "barbituric acid" would necessarily be included within its meaning. Indeed, the definitions referred to cannot even agree among themselves on one standard definition. These differing and somewhat inconsistent meanings reveal that "drug" is ambiguous, uncertain, and susceptible to a variety of possible constructions.

c. Arizona law requires these conflicts and ambiguities in the meanings and uses of "drug" to be resolved by a fact-finder, and Beadel is consistent therewith.

As noted above, Arizona law requires that when recourse is had to external facts and circumstances to resolve the ambiguity in a contract, and where those external facts themselves are conflicting, resolution of that latter conflict is for the jury as trier of fact. In the present case, because the word "drug" was undefined in the policy, recourse to the various standard reference works was necessary. Such recourse revealed a variety of definitions and meanings of the term "drug", and these various meanings are sufficiently conflicting and inconsistent with one another to create an uncertainty as to which sense of the term was intended by BMA in its policy. Under these circumstances, Arizona law requires these conflicts in extrinsic definitions resorted to in an attempt to define "drug" to be resolved by a finder of fact, normally the jury.

Counsel for BMA argued strongly at the hearing on its Motion for Summary Judgment that the *Beadel* case had decided the meaning of the word "poison" as a matter of law and that the court in that case had heard no evidence, nor had there been a jury finding, as to what the ordinary man thought "poison" meant. Counsel argued that *Beadel*, therefore, was precedent for the District Court's resolution of the ambiguity in the word "drug" (RT/mot., pp. 15-16).

In fact, however, counsel for BMA totally misconstrues the effect of the *Beadel* case. *Beadel* was a declaratory judgment action brought by the insurer; and since the insurer did not request a jury, as was its right under Arizona's Uniform Declaratory Judgments Act, trial was had to the court sitting as both judge *and jury*. Evidence *was* heard and the trial court made both findings of fact and conclusions of law (475 P.2d at 291). Consequently, the action of the Arizona Court of Appeals consisted not in making an original ruling as a matter of law on the meaning of "poison", but rather in affirming findings and conclusions of the trial court formed after a full presentation of the evidence to that court as finder of fact. Arizona law does not require such conflicts in external evidence to be resolved by a *jury*, it merely requires such resolution by a *fact finder*:

> "The responsibility for the interpretation of contracts is upon the court. (Citing cases) The resolution of any factual issues that may pertain to the construction of a contract is a *fact finding* process as to which, when the evidence is conflicting, the decision of the *fact finder* is conclusive. (Citing cases)" *Sam Levitz, supra*, 457 P.2d at 943 (Emphasis added)

d. In awarding summary judgment, the courts below not only neglected controlling Arizona law and especially the Beadel case but also ignored an obvious material fact issue.

In the present case, just as in *Beadel*, an ambiguity exists with regard to which meaning should be assigned to the undefined term "drug" in the exclusionary clause of the policy. In *Beadel*, however, each party had an opportunity to present its evidence regarding the proper meaning of "poison" to a finder of fact. That finder of fact, which happened to be the court, weighed the evidence and resolved the conflicting fact issue regarding the meaning of the undefined term. Applying the well settled Arizona law on insurance policy construction noted above, both the trial court and the Court of Appeals construed the ambiguous language strictly against the insurer and for coverage of the insured.

In this case, by way of contrast, the proceedings in the District Court did not involve a presentation to a fact finder of conflicting evidence regarding a genuine fact issue; rather, they involved a hearing whose purpose was to determine if that fact issue existed or if summary judgment was proper. In these circumstances, the course which the District Court was to follow and the law which it was to apply was clear and settled: After applying the Arizona law regarding the construction of undefined exclusionary language, the court was to determine if the differing definitions of the word "drug" and the determination of which one was to be applied to BMA's policy presented a genuine issue of material fact. If even the slightest doubt existed that such a fact issue was presented, it was the court's duty to decline summary judgment and leave the resolution of that fact issue to a finder of fact.

Rather than follow the clear and well settled principles of law noted above, however, the District Court in this case drew instead on its television experience to resolve the ambiguity and, in the process, to commit fundamental error by overlooking an obvious fact issue:

> "THE COURT: I suppose that anyone who has lived long enough to be exposed to the 'boob tube' for any length of time has a pretty good idea of what a drug is. I rather expect that aspirin would be included, and all the rest of the pills that are advertised.
>
> * * *
>
> "I believe that barbiturates are a 'drug' within the meaning of the policy.
>
> "The motion for a summary judgment will be granted. . . ." (RT/mot., p. 17).

The award of summary judgment by the District Court in this case was wrong beyond doubt; for a genuine issue of material fact clearly exists regarding the meaning of the undefined term "drug", and a trial to determine that issue clearly must be had. The fact issue is evident as is the District Court's error, when the pleadings, affidavits, memoranda, etc. in the record are read in the light most favorable to Mesa Oil.

The important thing to remember is that trial is required if even the *slightest doubt* as to the existence of a material fact issue appears. Here, the existence of that fact issue is beyond doubt.

3. The Court of Appeals Not Only Ignored the Clear and Settled Principle That Federal Courts in Diversity Actions Are to Apply the Substantive State Law but It Also Ignored Its Own Adopted Precedent on the Particular Substantive Issue Here Involved.

The Court of Appeals for the Ninth Circuit said in *State Farm Mutual Automobile Insurance Company* v. *Thompson*, 372 F.2d 256, 258 (9th Cir. 1967):

> "While, in a sense the facts show the existence of a 'family' arrangement of sorts, the question remains whether it was enough to constitute Mrs. Thompson a member of the Bailleres' 'family', within the meaning of the exclusion clause. The term 'family', which is not defined in the policy, is at best imprecise and having in view the possible meanings which may be given to it, follows the universal rule that where an insurance policy is ambiguous or susceptible of two constructions, that construction will be given it which is most favorable to the insured.
>
> ". . . Since this is a diversity suit, the question of whether, within the meaning of the policy, Mrs. Thompson was a member of Bailleres' family is to be determined in accordance with Arizona law . . ."

In the instant case the Court of Appeals ignored the fact that:

(a) The policy in question failed to provide a definition,

(b) There are at least three different possible interpretations that can be given to the word "drug", and

(c) The strictest standard of construction must be applied in construing an undefined term in an exclusionary clause against the insurer.

The Court of Appeals, therefore, has ignored its own precedent and its decision should be reversed.

4. The District Court and the Court of Appeals Rested Their Decisions on a Set of Non-Existent Facts.

The courts below took little notice of the fact that BMA did not include alcohol as a "drug", but focused its attention solely on barbiturates. And there is no evidence that a barbiturate was taken.

The Court of Appeals in resolving the question in favor of respondent did not address itself to its own question:

> "The question presented is whether the meaning of the word, 'drug', as used in the insurance policy so clearly includes barbituric acid that there is no room for doubt on that point among reasonable men."

The Court of Appeals in its concluding paragraph misstated the question as being only whether the "term, 'drug', is so ambiguous as to leave reasonable doubt whether barbiturates fall within its parameters.". The Court wrongly lessened its standard of duty thereby, and misstated the question. The real issue deals not with barbiturates but with barbituric acid and does not deal with reasonable doubt but with the question of whether or not:

> "The word, 'drug', as used in the insurance policy, so clearly included barbituric acid that there is no room for doubt on that point among reasonable men."

The opinion of the Court of Appeals decides the wrong question:

"We are convinced, and believe that the Arizona courts would so hold, that barbiturates also constitute a paradigm example of a substance that the common laymen would classify as a drug."

The Court changed the factual basis of the case from one in which merely the presence of barbituric acid was found and from an instance wherein the case was presented for summary judgment prior to a trial on the merits, to the posture of a post trial review: review of a trial which petitioner requested but never received. The case decided by the Court of Appeals is not the case that was filed with that Court on appeal and consequently the decision of that court is erroneous.

CONCLUSION

The Court of Appeals for the Ninth Circuit ignored the clear and settled principle that federal courts with diversity jurisdiction must apply the substantive law of the state in which they sit and it decided an important state question contrary to state law. Judge Ozell Trask of the Ninth Circuit, who had recently practiced in Arizona, in his dissent recognized that the majority opinion was *not* applying Arizona law. Judge Trask pointed out in his dissent that the *Malanga* and *Beadel* cases controlled and as a result the District Court should be reversed. For these reasons, and all the reasons stated above, certiorari should issue to the Ninth Circuit to review its divided decision in this case.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MESA OIL COMPANY, an Arizona corporation, Plaintiff, vs. BUSINESS MEN'S ASSURANCE COMPANY OF AMERICA, a Missouri corporation, Defendant.	No. Civ-70-518 Phx WEC

Judgment

The above entitled cause came on for hearing before the Court upon defendant's motion for summary judgment. The matter was submitted upon oral argument and memoranda of the respective parties.

Plaintiff's insured died as a result of the use of barbiturates and alcohol in combination. The defendant's policy provides that "No benefit will be paid if death results directly or indirectly from: 1) * * *; 2) inhaling any gas (except while performing occupational duties), or taking any poison or drug, voluntarily or involuntarily; * * *." Defendant has previously voluntarily dismissed its counterclaim.

Plaintiff asserts the exclusionary language of the policy is ambiguous. This Court is of the opinion the exclusionary language of the policy is not ambiguous. There

is no genuine issue as to any material fact. Defendant is entitled to judgment as a matter of law.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that plaintiff take nothing by its complaint; that defendant's motion for summary judgment be granted; that defendant have and recover its costs herein incurred.

DATED this 16th day of December, 1970.

/s/ Walter E. Craig
United States District Judge

Copies sent to:
Michael A. Curtis, Esquire
Douglas L. Irish, Esquire

APPENDIX "B"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MESA OIL COMPANY, an Arizona corporation,

Appellant,

vs.

BUSINESS MEN'S ASSURANCE COMPANY OF AMERICA, a Missouri corporation,

Appellee.

No. 71-1204

[March 6, 1973]

Appeal from the United States District Court for the District of Arizona

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Before: ELY, CARTER, and TRASK, Circuit Judges.

ELY, Circuit Judge:

Appellant, Mesa Oil Company (Mesa) was the named beneficiary of a life insurance policy issued by appellee, Business Men's Assurance Company of America (BMA), on the life of Cletus Chamberlain. The accidental death provision of that policy contained the following exclusion:

> "RISKS NOT COVERED
>
> No benefit will be paid if death results directly or indirectly from . . . taking any . . . drug, voluntarily or involuntarily; . . ."

Chamberlain, the insured, died as a result of the combined effect of barbiturates and alcohol. BMA refused to pay the accidental death benefits, and Mesa brought this suit.

The District Court, assuming its diversity jurisdiction, awarded BMA summary judgment. The question presented is whether the meaning of the word "drug," as used in the insurance policy, so clearly includes barbituric acid that there is no room for doubt on that point among reasonable men.

The policy fails to provide a definition or explanation of the term "drug." Arizona law, which is, of course, here controlling, requires undefined insurance policy terms to be defined in the common everyday language of the average layman rather than in either technical medical terms or as statutes would define them. *Malanga* v. *Royal Indemnity Co.*, 101 Ariz. 588, 422 P.2d 704 (1967); *Dickerson* v. *Hartford Accident & Indemnity Co.*, 56 Ariz. 70, 105 P.2d 517 (1940). Further, undefined terms in an insurance policy are to be construed strictly in favor of the insured. *United American Life Insurance Co.* v. *Beadel*, 13 Ariz. App. 196, 475 P.2d 288 (1970); *Malanga* v. *Royal Indemnity Co., supra;* and *Brenner* v. *Aetna Ins. Co.*, 8 Ariz. App. 272, 445 P.2d 474 (1968). Finally, if the undefined term appears in an exclusionary clause, an even stricter standard of construction must be applied. *Brenner, supra.*

Mesa, after noting that there is no definition of the term "drug" in the contract, offers three dictionary definitions of the term in attempting to demonstrate that even these common sources are in disagreement over the term's definition.[1] Mesa then contends that the absence of a

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1. Mesa's brief sets out the following examples of dictionary definitions of the term "drug":

> "*Black's Law Dictionary*, Fourth Edition (1951), defines 'drug' as being:
>
> 'The general name of substances used in medicines; any substance, vegetable, animal, or mineral, used in the composition or preparation of medicines; any substance used as a medicine. . . .'

(Continued on following page)

policy definition, combined with the differences in dictionary definitions, required the court to deny the motion for summary judgment. We disagree.

In *Malanga* v. *Royal Indemnity Co., supra,* the insured decedent died from the combined effect of alcohol and barbiturates. The insurance company refused to pay the accidental death benefit to the decedent's wife, relying upon the following terms of the insurance policy:

> "'*This insurance is against loss . . . resulting directly and independently of all other causes from accidental bodily injuries* sustained during the term of the policy . . .' (emphasis added)."

422 P.2d at 706 (emphasis in original).

As in the present case, the key term ("bodily injury") was not defined in the policy. The insurance company there claimed that bodily injury was limited to those cases wherein some cut, bruise, or rupture appeared on part of the body. The court declined to accept this limitation and ruled that the decedent's death was so clearly included within the meaning of the term "bodily injury" that ". . . we think it is impossible to conclude otherwise." 422 P.2d at 707.

In *United American Life Insurance Co.* v. *Beadel, supra,* the insured also died from the synergistic effect of alcohol and barbiturates. The insurer there involved also refused

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Footnote continued—

> *Webster's Third International Dictionary* defines 'drug' not only as a substance used as a medicine or in the making of medicines, but also as 'something narcotic in its effect.'
>
> *The Random House Dictionary of the English Language* (Random House, Inc., 1967) defines 'drug' not only as a medicinal substance or a narcotic but also as 'a chemical substance administered to . . . prevent or cure disease or otherwise enhance physical or mental welfare' and 'any personal hygienic item sold in a drug store. . . .' "

to pay accidental death benefits, claiming, *inter alia*, that an exclusionary clause in the policy denied recovery "if death results directly or indirectly . . . from any poison . . . accidentally or otherwise taken. . . ." 475 P.2d at 290. The term "poison" was not defined in the policy.

The Arizona court, in determining whether the poison exclusion limited recovery, noted that the term poison, "[c]ommonly speaking, . . . conjures up such names as arsenic or cyanide." 475 P.2d at 291. The synergistic effect of alcohol and barbiturates, however, was held to be so far from the mainstream connotations of the term "poison" as to defeat the insurance company's claim. Thus, the court held that "the accident is covered by the policy terms and is not excluded as poison." 475 P.2d at 292.

In the case at bar it is suggested that the undefined term "drug" is so ambiguous as to leave reasonable doubt whether barbiturates fall within its perameters. The trial court, however, was of the opinion that "anyone who has lived long enough to be exposed to the 'boob tube' for any length of time has a pretty good idea of what a drug is. * * * I believe that barbiturates are a 'drug' within the meaning of the policy." Further, appellant's own brief notes that "In the present case, the word 'drug' normally suggests to the average layman such substances as heroin, morphine, cocaine, etc."

We are convinced, and believe that the Arizona courts would so hold, that barbiturates also constitute a paradigm example of a substance that the common layman would classify as a drug. The use of barbituric acid in the form of a depressant, often referred to as a "downer," has become, unfortunately, extremely commonplace in our society.

> "Drug use is nearly universal in this country. Millions of Americans use drugs every day for the tranquilizing, stimulating and hallucinogenic effects upon their brains. The great bulk of this drug use is legal and unrelated to crime. For example, 27,478,000 prescriptions were written for stimulants and 80,267,000 for barbiturates in 1968. The National Institute of Mental Health estimates that eight billion amphetamine, barbiturate and methamphetamine pills were legitimately manufactured in the United States in calendar 1969—enough for 40 doses for every man, woman and child in this country."[2]

Thus, while it may have been questionable whether barbiturates constitute a "poison," or whether the effect produced by their use in combination with alcohol constitutes "bodily injury," we think it is beyond dispute that any ordinary layman would consider barbituates to be "drugs" within the meaning of the term.

In reaching this decision we are not unmindful of the requirement to construe undefined policy terms strictly in favor of the insured, nor of our duty to apply an even stricter standard of construction where, as here, the undefined term appears in an exclusionary clause. We are nonetheless of the opinion that the District Court's dispositive conclusion below was correct. This opinion is reinforced by the proposition, which has been frequently emphasized, that "We are required to attach great weight to the district judge's determination as to the law of the particular state in which he sits." *Insurance Co. of North America* v. *Thompson*, 381 F.2d 677, 681 (9th Cir. 1967). *See also Turnbull* v. *Josephine Bonkowski, et al.*, 419 F.2d

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2. ABA Special Comm. on Crime Prevention and Control, *New Perspectives on Urban Crime* 25 (1972).

104 (9th Cir. 1969); *Owens* v. *White*, 380 F.2d 310 (9th Cir. 1967).

AFFIRMED.

TRASK, Circuit Judge, dissenting:

Were I deciding this case as an original question I would write much as the author of the majority has done. However, as a diversity case to be decided according to the law of Arizona, I am unable to distinguish it from *Malanga* v. *Royal Indemnity Co.*, 101 Ariz. 588, 422 P.2d 704 (1967), and *United American Life Insurance Co.* v. *Beadel*, 13 Ariz. App. 196, 475 P.2d 288 (1970). Those decisions appear to me to require reversal.